

G-008/C-91-942 ORDER DENYING MOTIONS FOR MUTUAL DISCOVERY AND
CONTESTED CASE HEARING

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Don Storm
Tom Burton
Cynthia A. Kitlinski
Dee Knaak
Norma McKanna

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Complaint
of the Minnesota Alliance for
Fair Competition Against
Minnegasco, a Division of Arkla,
Inc.

ISSUE DATE: February 8, 1993

DOCKET NO. G-008/C-91-942

ORDER DENYING MOTIONS FOR MUTUAL
DISCOVERY AND CONTESTED CASE
HEARING

PROCEDURAL HISTORY

On November 27, 1991 the Minnesota Alliance for Fair Competition (MAC), a trade organization of plumbing, electrical and appliance associations, filed a complaint against Minnegasco, a regulated gas utility.

On January 29, 1992 the Commission issued its ORDER SEVERING MINNEGASCO FROM THE INVESTIGATION DOCKET, GRANTING DISCOVERY RIGHTS, REQUIRING REPORT AND AUTHORIZING COMMENTS. That Order removed Minnegasco from an ongoing generic investigation of appliance sales and service operations by regulated utilities and established this complaint docket. It also granted MAC discovery rights and required MAC to file a report on the results of its investigation.

On November 10, 1992, the Commission issued its ORDER ESTABLISHING ACCOUNTING PROCEDURES AND REQUIRING FURTHER FILINGS. Among other things the Commission directed Minnegasco to file detailed information with respect to cost allocation methods, regulatory costs and the Company's leak survey program on or before November 20, 1992. Parties were given 20 days to respond to Minnegasco's filing.

On November 30, 1992, Minnegasco made a filing in response to the November 10, 1992 Order.

On December 15, 1992, the Minnesota Department of Public Service (the Department) and the Minnesota Alliance for Fair Competition (MAC) filed requests for additional time to respond to Minnegasco's filing. In addition, MAC filed a Motion to Compel Discovery.

On December 18, 1992, Minnegasco filed a reply to MAC's motions and motions of its own requesting 1) an extension of time to respond to MAC's discovery, 2) mutual discovery, and 3) a contested case hearing.

On December 21, 1992, the Commission met to consider this matter.

On December 28 and 30, 1992, MAC and the Department, respectively, filed responses to Minnegasco's Motion for Contested Case Hearing.

On January 5, 1993, the Commission issued its ORDER GRANTING DISCOVERY IN PART AND EXTENDING THE TIME FOR FILING COMMENTS. In this Order, the Commission

- 1) affirmed MAC's discovery rights,
- 2) directed Minnegasco to respond to all of MAC's pending Information Requests except Information Request 214 by January 8, 1993,
- 3) deferred consideration of MAC's motion to compel response to Information Request 214,
- 4) extended the time for receiving comments from all parties regarding Minnegasco's November 20, 1992 filing to January 20, 1993, and
- 5) noted that Minnegasco's motions for discovery and a contested case hearing were untimely for consideration at that time but would be considered in due course at a later date.

On January 20, 1993, the Department and the Residential Utilities Division of the Office of the Attorney General (RUD-OAG) filed comments regarding Minnegasco's compliance with the Commission's November 10, 1992 Order.

On January 25, 1993, MAC and Minnegasco filed separate letters advising the Commission that they had resolved the questions relating to MAC's Motion to Compel Information Request 214. MAC and Minnegasco both requested that the Commission take no further action on MAC's motion as relates to Information Request 214.

On January 28, 1993, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

MAC's Motion to Compel Response to Information Request 214

In its Order dated January 5, 1993, the Commission granted MAC's Motion to Compel in large part, directing Minnegasco to respond to all of MAC's pending Information Requests except Information Request 214. The Commission deferred consideration of that subject to allow the parties to meet in an attempt to resolve the dispute regarding Information Request 214.

MAC and Minnegasco met on January 5, 1993 and agreed that 1) Minnegasco would provide 1992 updating information regarding MAC Information Requests 35, 37 and 130 (all contained in Information Request 214) and 2) no other information regarding any other MAC Information Request contained in No. 214 was required.

In light of the parties' resolution of their discovery dispute, the Commission will take no further action on MAC's motion.

Minnegasco's Motion for Contested Case Hearing

In support of its Motion for Contested Case Hearing, Minnegasco asserted that a contested case hearing is required when, as here, the Commission acts in its quasi-judicial capacity and determines facts like a court. The Company argued that a contested case hearing was required at this time by the Minn. Rules, Part 7830.3000, Minn. Stat. § 216B, and the 14th Amendment of the U.S. Constitution.

MAC urged the Commission to deny Minnegasco's Motion. MAC stated that the Motion was untimely because the process established by the Commission when it severed Minnegasco from its generic investigation in Docket No. G, E-999/CI-90-1008 was not completed. MAC asserted that there were no facts before the Commission to support Minnegasco's claim that all factual disputes cannot be resolved in the current proceeding without a contested case hearing.

The Department also recommended that the Commission deny Minnegasco's Motion as premature. In its written response filed December 30, 1992, the Department noted that it and other interested parties including MAC had not yet responded to Minnegasco's November 30, 1992 filing that was responding to the Commission's November 10, 1992 Order. The Department argued that it was impossible to assess what issues of material fact, if any, are in dispute. The Department asserted that Minnegasco had failed to describe any facts in dispute and issues to be addressed in any contested proceeding.

RUD-OAG Comments

The RUD-OAG did not file comments on this issue, but in oral argument asserted that one fact undoubtedly in dispute was the reasonableness of Minnegasco's allocation of expenses between its regulated utility and non-regulated appliance sales and service operations. The RUD-OAG stated that it was not necessary for the Commission to delineate all the disputed factual matters to be litigated in the contested case proceeding before referring the matter to the Office of Administrative Hearings (OAH), that the contested matters would appear and be developed by the parties in the course of the contested case proceeding. The RUD-OAG argued that it would be inefficient to delay ordering a contested case.

Commission Action

This matter involves a complaint by MAC before the Commission pursuant to Minn. Stat. § 216B.17 (1992). Minnegasco's statutory asserted right a contested case hearing must be evaluated in light of that statute. The statute states:

Subd. 8. If after making an investigation under subdivision 1 and holding a hearing under this section, the commission finds that all significant factual issues raised have not been resolved to its satisfaction:

(1) ...; and

(2) for investigation of [matters other than the reasonableness of rates of a public utility], the commission shall order that a contested case proceeding be conducted under chapter 14.

The Commission has not completed its investigation. Nor has it held a hearing at which it has found that there are significant factual issues that have not been resolved to its satisfaction. Therefore, the Commission will not order a contested case proceeding at this time.

To illustrate the incompleteness of its investigation, the Commission notes that comments it requested as part of this investigation and recently filed by parties regarding Minnegasco's compliance with the Commission's November 10, 1992 Order have not come before the Commission for review.

Regarding significant unresolvable fact issues, the Commission cannot find on the basis of its review to date that even one significant fact issue cannot be resolved to its satisfaction. In its Motion, Minnegasco stressed that most areas of dispute have been resolved and that only one disputed subject remains: its allocation of expenses between its utility and non-utility operations. Despite Minnegasco's and the RUD-OAG's assertions that this area involves unresolvable factual disputes, the record does not make clear what specific facts are actually in dispute. At this point, it is unclear whether there is any factual dispute between the parties regarding how Minnegasco is currently allocating those expenses. The dispute may simply be a policy dispute as to whether Minnegasco's allocation is appropriate.

Minnegasco also claimed to be entitled to a contested case hearing under Minn. Rules, Part 7830.3000. The rule states:

When issue has been joined upon formal complaint by service of an answer or by failure of the respondent to answer, and proof thereof has been filed,..., the commission shall assign a time and place of hearing pursuant to parts 7830.3100 and 7830.3200.

The Commission's responsibilities under its rule, of course, harmonize with the statute, Minn. Stat. § 216B.17, subd. 8 (1992). As such, the rule may not be read to eliminate the prerequisites to a contested case hearing established in the statute: completion of the Commission's investigation and the holding of a hearing (not a contested case hearing) at which the Commission finds significant factual issues raised have not been resolved to its satisfaction. See Minn. Stat. § 216B.17, subd. 8 (1992). As discussed previously, those prerequisites have not occurred. Therefore, referral for contested case hearing is not required by the rule at this time.

As to Minnegasco's claim to be entitled to a contested case hearing at this time under the 14th Amendment of the U.S. Constitution, the Commission disagrees. The Commission's decision to complete its investigation and hold a hearing to determine whether there are significant factual issues that have not been resolved to its satisfaction will provide all the process that Minnegasco is due at this stage of the matter.

Minnegasco's Motion for Discovery Rights

In its motion for discovery rights, Minnegasco explained that the purpose of its request was to fully develop the facts and facilitate the Commission's examination of the remaining issue in this docket. Minnegasco identified that issue as the allocation of expenses between Minnegasco's regulated utility and non-regulated appliance sales and service operations. At the same time, Minnegasco moved for a contested case hearing. It appears that Minnegasco's request was for discovery rights within a contested case proceeding rather than outside such a proceeding. Since the Commission denies Minnegasco's request for a contested case hearing at this time, the Company's request for discovery ancillary to that hearing will likewise be denied.

ORDER

1. Minnegasco's Motions for Mutual Discovery and a Contested Case Hearing in this matter are denied.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)